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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 510

WORLD INSURANCE COMPANY, *Appellant*,

v.

MRS. GUY D. BETHEA, ADMINISTRATRIX, ESTATE OF DR. GUY D. BETHEA, DECEASED, *Appellee*.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS BY APPELLEE FOR WANT OF JURISDICTION AND OTHER GROUNDS

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And now comes appellee herein and moves this Honorable Court that the appeal be dismissed, Rule 16 (1) (a) and (1) (b).

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi (R. 309-320) (App. A of Statement As To Jurisdiction) appears in 93 So. (2d) 624 (not yet officially reported). The order overruling the suggestion of error appears at page 344 of the record (App. B of Statement As To Jurisdiction).

JURISDICTION

There is a want of jurisdiction for review and appellant's Statement As To Jurisdiction to confer jurisdiction by direct appeal under Title 28, United States Code, Section 1257(2) is without substance and is not supported by the record or the applicable decisions of this Court.

STATUTE INVOLVED

The statute involved is Section 5706 of the Mississippi Code of 1942, and same appears in pages 3-4 of appellant's Statement As To Jurisdiction.

QUESTION PRESENTED

The question presented appears on page 4 of appellant's Statement As To Jurisdiction.

STATEMENT OF THE CASE

Appellee's decedent, Dr. Guy D. Bethea, filed suit in the County Court of Forrest County, Mississippi, for the recovery of benefits then accrued, under a health and accident policy issued to him by appellant (R. 2-17). Appellant, as an affirmative defense, pleaded that false representations were made by the insured in his written application for the policy of insurance, which were material to the risk assumed by the insurer, and that such representations were false and known to be false by the insured (R. 33). The insured Dr. Bethea, responded to the affirmative matter contained in the answer of insurer (R. 36-39), as follows: (1) he denied that he represented that no life, accident or health insurance issued to him had been cancelled, but alleged that he, in fact, told appellant's insurance agent that a policy had been cancelled or a

renewal refused; (2) he denied that he represented that he had never made claim for injury, but alleged that, in fact, he told the said agent of appellant that he had so done; (3) he admitted that he told the appellant's agent he was mentally and physically sound to the best of his knowledge at the time of the making of application for insurance; (4) he admitted that he told said appellant's agent that he had never had heart trouble or diabetes; and (5) he denied he told the said agent that he had not received medical or surgical advice or treatment, or had any local or constitutional diseases within the preceding five years, but alleged that he had, in fact, told appellant's agent that he had had gall bladder trouble in 1949, and that he had had physical checkups in 1947 and 1949.

The case was tried before a jury in the County Court upon the pleadings, evidence and issues of fact presented thereon, and upon instructions of the court, and the jury returned a verdict in favor of the insured, Dr. Bethea, in the principal sum of $2,926.56 (R. 56-57), which represented the accrued amount due up to the time of the filing of the Declaration (R. 2-17). Appellant then filed a motion for a new trial and to set aside the judgment, but did not raise a federal question (R. 58-59). The above motion for a new trial was overruled and appellant appealed to the intermediate appellate Circuit Court of Forrest County, and filed an assignment of error therein, but did not raise a federal question (R. 216). While the case was pending on the appeal in the intermediate appellate Circuit Court, Dr. Bethea died and the appeal procedure was revived in the name of his wife, as administratrix, who is the appellee herein. The intermediate appellate Circuit Court affirmed the judgment of the lower court (R. 218-219), and appellant prosecuted an appeal to the

Supreme Court of Mississippi, and filed therein its assignment of error, but did not raise a federal question (R. 225-226), and the Supreme Court of Mississippi affirmed the case (R. 309-320; App. A of Statement As To Jurisdiction); 93 So. (2d) 624. The court, in its opinion, said that:

> The paramount question involved is whether the defendant is relieved of liability on the policy upon the ground that the insured failed to disclose in his application information material to the risk to be assumed and gave false answers to questions propounded in the application which materially affected the risk to be assumed. *The solution of this question involves a consideration of the evidence.*[1] (R. 312)
>
> The proof shows without dispute that William Cole solicited the insurance on behalf of the defendant and prepared the application therefor and transmitted the same to the defendant, *and it is not controverted,*[2] and cannot be successfully controverted, that in so doing he is held to be the general agent of the defendant under Section 5706 of the Mississippi Code of 1942, which provides that every person who solicits insurance on behalf of any insurance company or who takes or transmits, other than for himself, an application for insurance "shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract". Cole's knowledge and information acquired in taking the application was, therefore, the knowledge and information of the defendant. (R. 312-313)
>
> * * *

[1] Italics added.

[2] Italics added.

> The appellant contends, however, that parol evidence to contradict the answers written in the application was inadmissible as varying the terms of a written contract, and that, therefore, the court erred in overruling the motion of the defendant to exclude this evidence and to direct a verdict for the defendant. We do not think that this contention of the defendant is well-founded. This Court has settled the proposition that if the agent of an insurance company undertakes the preparation of an application for insurance in his company, and by a mistake or omission failed to write down correctly the applicant's answers to the questions propounded, his company will be bound by such answers just as if they had been written down in the language used by the applicant and presented thus to the company for its action. (R. 316-317) . . . Like conclusions were reached by the Court in . . . Home Insurance Company of New York v. Thornhill, 165 Miss. 787, 144 So. 861, . . . (R. 318).

Appellant filed a suggestion of error to the opinion of the Supreme Court of Mississippi, and assigned four definite and expressed points as grounds thereof (R. 325-326), but said points did not raise a federal question, and it was in the written Argument and Brief on the suggestion of error (R. 327-342) that appellant, for the first time, attempted to raise the claimed federal question, and the suggestion of error was overruled, without an opinion. Subsequently, appellant filed his notice of appeal (R. 352-354), and in this Honorable Court, appellant contends that a federal question was created by an unexpected decision of the Supreme Court of Mississippi, without any prior opportunity for the appellant to anticipate or assert the question, and that the petition for rehearing constituted its first chance to present the matter to the state court, and that appellant could assert such federal question for

the first time in its Argument and Brief filed in the Supreme Court of Mississippi on the suggestion of error.

Provided all other federal jurisdictional requirements are met, as applied and construed under Title 28, United States Code, Section 1257(2), the whole point therefore, is whether the ruling here assailed should have been anticipated.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED OR EXPRESSLY PASSED ON

Appellant did not raise, as required under state procedure, a federal question by pleadings (Section 1475.5 of the Mississippi Code of 1942), evidence, motions, or assigned errors, in either the lower trial court (R. 58-59), intermediate appellate Circuit Court (R. 216), or in the Supreme Court of Mississippi (R. 225-226). Claimed errors, required under state procedure, must be pursued on appeal from the trial court to the Supreme Court of Mississippi. Appellant did not raise a federal question as a specific or assigned ground for rehearing in its suggestion of error (R. 325-326), and inasmuch as appellant, by argument, attempted to raise a federal question in its argument and brief on the suggestion of error, such argument and brief (R. 327-342) cannot be used to establish that a federal question was raised. *Live Oak Ass'n* v. *Railroad Commission,* 269 U.S. 354, 357-8; *Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54.

No federal question was involved and the Supreme Court of Mississippi did not rule on a federal question (R. 309-320) and never had an opportunity to rule on a federal question because such question was not raised,

but if it be construed that a federal question could be raised for the first time in this case in the Argument or Brief on the suggestion of error, or Notice of Appeal to this Court, then appellee submits that the raising of such question was not properly or timely raised under the well established rules of practice and procedure in Mississippi as well as the applicable decisions of this Court. *Revised Rules of the Supreme Court of Mississippi*, 215 Miss. 597, 599, (Rule 6), 600, (Rule 7), 602, (Rule 14); *Adams* v. *Board of Sup'rs of Union County*, 177 Miss. 403, 170 So. 684; *Hassie Hunt Trust* v. *Proctor*, 215 Miss. 84, 60 So. (2d) 551; *Comfort* v. *Landrum*, (Miss.), 52 So. (2d) 658; *Vinson* v. *Cooley*, (Miss.), 54 So. (2d) 750; *Smith* v. *Williams*, 36 Miss. 545; *DeMoe* v. *McLeod*, (Miss.), 87 So. (2d) 906, suggestion of error overruled, 89 So. (2d) 730; *Frady* v. *Bryan*, 210 Miss. 1, 48 So. (2d) 611; *Havard* v. *Board of Sup'rs*, 220 Miss. 359, 70 So. (2d) 875. Therefore, the Supreme Court of Mississippi was under no duty to rule on a question not specifically assigned as a point in the assignment of errors.

The same rule applies on the suggestion of error. No federal question was specifically raised as a ground for rehearing in the suggestion of error (R. 325-326), and if it was raised, the Supreme Court of Mississippi was under no duty to rule on it under state procedure. The Supreme Court of Mississippi was under no duty to grant a rehearing on the suggestion of error. *Taylor* v. *Copeland*, 183 Miss. 85, 183 So. 519, overruling suggestion of error, 183 Miss. 85, 181 So. 742; *Stone* v. *Martin Veneer Corp.*, 183 Miss. 712, 184 So. 435; *Gulf Refining Co.* v. *Harrison*, 201 Miss. 294, 30 So. (2d) 807; *Mississippi Oil & Gas Bd.* v. *Superior Oil Co.*, 202 Miss. 139, 32 So. (2d) 200; *Luck* v. *Seal*, 129 Miss.

228, 91 So. 386. The proper method of raising the federal question was dependent upon the foregoing state practice, at least as long as appellant had a reasonable opportunity to have his case heard and determined. *Central Union Co.* v. *Edwardsville*, 269 U.S. 190, 194-5; *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 462-3; *Parker* v. *Illinois*, 333 U.S. 271, 574-5; *John* v. *Paullin*, 231 U.S. 583, 585; *Bailey* v. *Anderson*, 326 U.S. 203, 206-7.

THERE IS A WANT OF JURISDICTION

There is a want of jurisdiction for review in this case, *supra*. The federal question was not timely or properly presented to the state court unless upon the suggestion of error (R. 325-326), or Argument or Brief in support of same (R. 327-342). The Supreme Court of Mississippi refused to consider them. The general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Herndon* v. *Georgia*, 295 U.S. 441, 443. Appellant contends that the present case falls within an exception to the general rule—namely, that the claimed federal question respecting the validity of Section 5706 of the Mississippi Code of 1942, as applied by the Supreme Court of Mississippi, created an unexpected decision, without any prior opportunity for appellant to anticipate or assert the matter to the Supreme Court of Mississippi. This contention is without substance and is not supported by the record. This is not a case where, as in *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366, the federal jurisdiction claimed resulted from stipulation of counsel and followed by acquiescence of the state court, or *Brinker-*

hoff-Faris Trust Co. v. *Hill*, 281 U.S. 673, 678, where the federal claim was raised at the first opportunity which involved the state trial court refusing to hear plaintiff's complaint, or *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 319-20, where the question could not have been presented earlier and the federal claim was charged as a ground for rehearing, or *Saunders* v. *Shaw*, 244 U.S. 317, 319-20, where the act of the state Supreme Court denied rights unexpectedly, and where the intervening defendant was denied the opportunity to present his evidence and the federal jurisdiction arose from a denial of opportunity to be heard, due to the unanticipated disposition of the case in the state Supreme Court. Therefore, it appears from the cases, *supra*, as applied to appellant raising a federal question in its petition for rehearing, that before this Honorable Court will review, there must be a denial of the right to be heard or an opportunity to be heard on the issue presented. Appellant was fully heard under state practice and procedure.

THIS CASE AND THE SAUCIER CASE DISTINGUISHED: The case of *Saucier* v. *Life & Casualty Company of Tennessee*, 189 Miss. 693, 198 So. 625 (1940), cited in appellant's Statement As To Jurisdiction, is not applicable to the facts in this case or the applicable Mississippi law, and will not support federal jurisdiction, but supports appellee's contention that the decision of the Supreme Court of Mississippi rested on nonfederal grounds. Appellant contends (R. 332) that the acts of the agent in the case at bar, as in the *Saucier* case, were both done against a direct stipulation in the policy prohibiting such actions (R. 329). Appellant presumes in its suggestion of error that the premise of the court was that the agent, Cole, was without authority

to alter the expressed provisions of the contract unless his authority was increased by operation of law, and because of the provisions of Section 5706 of the Mississippi Code of 1942 (R. 336-337). Appellee submits that this was not the premise of the Supreme Court of Mississippi in its opinion (R. 309-320). The state Supreme Court based its opinion upon the controlling law as set out in *Home Insurance Company of New York* v. *Thornhill,* 165 Miss. 787, 144 So. 861 (1932), and other like decisions, cited with approval by the state court (R. 318). In the *Saucier* case, the agent attempted to waive advance payment of the initial premium, required by written provision in the policy as being necessary to bind the company. The court, in the *Saucier* case, held that the provisions of Section 5196 of the Mississippi Code of 1930, the reenactment of which is 5706 of the Mississippi Code of 1942, could not increase the powers of the special agent therein to the powers of a general agent with authority to then make material changes in a policy of insurance, and that such a statute, so construed, would be in violation of the Fourteenth Amendment of the Federal Constitution. However, in the *Thornhill* case, as in the case at bar, the agent filled out the application erroneously with knowledge of the correct answers having been given to him by the insured. The court, in the *Thornhill* case, stated that the effect of the aforesaid statute, *supra,* was merely to write out of the contract of insurance any limitation on the common law liability of the principal for the knowledge of his agent acquired in the taking of the application, considering it a burden or liability imposed by law within the meaning of the statute. However, in the *Saucier* case, the court considered that there was no burden or liability im-

posed by law, within the purview of the statute, that would permit the special agent therein to deliver the policy without collecting the advance premium in violation of the policy provisions. The *Thornhill* case, as in the case at bar, does not vest powers in the agent, by application of said statute, but merely protects the common law rule of liability of a principal for the knowledge acquired by his agent in the taking of the application of insurance. Furthermore, in the case at bar, it is not controverted that Cole, appellant's agent, was the general agent of appellant (R. 312). The policy of insurance in the *Thornhill* case, as in the *Saucier* case, and the case at bar, all contained provisions of similar import, as to the limitations of power of any agent to waive, alter or modify any terms of the contract of insurance. Therefore, appellee contends that the *Saucier* case is not applicable or controlling in the case at bar, but in fact, the *Thornhill* case is the existing law in the State of Mississippi relative to the application of Section 5706 of the Mississippi Code of 1942. Therefore, if the Supreme Court of Mississippi based its decision on the existing *Thornhill* rule, then appellant's contention that the decision in the case at bar came by surprise from an unanticipated ruling, without prior opportunity to assert or claim a federal question, which could not have been reasonably anticipated from prior decisions, is without substance in this Honorable Court since the rule in the *Thornhill* case was in existence and applicable at the time of the institution of this suit by appellee's decedent.

From the appellee's "Statement of the Case", *supra*, it clearly appears that appellant had had ample opportunity in the pleadings (Section 1475.5 of the Mississippi Code of 1942), motions, and objections in the

trial court, assignment of error in the intermediate appellate Circuit Court, and in the Supreme Court of Mississippi, to present the question and objection to Section 5706, of the Mississippi Code of 1942 (pp. 3-4 of the Statement As To Jurisdiction), as one arising under the Fourteenth Amendment.

Appellant had had ample opportunity earlier than in its Argument or Brief on the suggestion of error, or in its Notice of Appeal (R. 352-354) to present its objection as one arising under the Fourteenth Amendment. *Herndon* v. *Georgia*, 295 U.S. 441, 443-4; *Corkran Oil & Development Co.* v. *Arnaudet*, 199 U.S. 182, 193-4; *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181; *Live Oak Ass'n* v. *Railroad Commission*, 269 U.S. 354, 357; *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 162, 164. See also *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128; *Forbes* v. *State Council*, 216 U.S. 396; *Simmerman* v. *Nebraska*, 116 U.S. 54; *Consolidated Turnpike Co.* v. *Norfolk & O. V. R. Co.*, 228 U.S. 326, 333-4.

Therefore, appellant (an insurance company) was chargeable with knowledge of the decisions of the Supreme Court of Mississippi involving principal and agent and particularly insurance law, as well as the *Saucier* case, *supra*, and Mississippi Code Section 5706, in all stages of this case, and had ample opportunity to raise any and all questions. Moreover, the opinion of the Supreme Court of Mississippi is based upon "a consideration of evidence" (R. 312), and its opinion rests upon the evidence and the applicable Mississippi law announced in *Fidelity & Casualty Company of New York* v. *Cross*, 131 Miss. 632, 95 So. 631; *Home Insurance Company of New York* v. *Thornhill*, 165

Miss. 787, 144 So. 861; *Calvert Fire Insurance Co.* v. *Swain*, 79 So. (2d) 537. This Honorable Court will not pass upon the question of the constitutionality of a state statute which was not raised in the proceedings in the state court, and which those courts had no opportunity to decide, *Adler* v. *Board of Education*, 242 U.S. 485; *Young* v. *Masci*, 289 U.S. 253, or where a state court did not pass on a question whether a state statute is a violation of a provision of the Federal Constitution, *State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154. Moreover, appellant's contention is without substance since it has failed to establish that the validity of the statute can be challenged in its Argument and Brief advanced for the first time in the appellate court on the suggestion of error. *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 659, 651.

THE JUDGMENTS AND OPINIONS OF THE SUPREME COURT OF MISSISSIPPI REST ON ADEQUATE NON-FEDERAL BASIS AND ON ADEQUATE STATE GROUNDS

(1) State procedural law, which forbids the raising of federal questions, or any other questions, as Mississippi, at late stages in the case or by any other than a prescribed method, *supra*, is a valid exercise of state power, *Williams* v. *Georgia*, 349 U.S. 375, 382. This Honorable Court is without power to decide whether constitutional rights have been violated when the federal questions, as in this case, are not seasonably raised in accordance with the requirements of state law, *Edelman* v. *California*, 344 U.S. 357, 358-9, and non-compliance with such local law is thus an adequate state ground for the decision below, *Edelman* v. *California*, *supra*.

(2) Where, as in this case, the judgments and opinions of the Supreme Court of Mississippi shows that the decision *might* have rested upon a nonfederal ground, this Honorable Court will not take jurisdiction to review the judgment. *Durley* v. *Mayo*, 251 U.S. 277, 281.

(3) Where, as in this case, the decision of the Supreme Court of Mississippi *might* have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, this Honorable Court will not undertake to review the judgment. *Durley* v. *Mayo, supra.*

(4) The finding of fact by the Supreme Court of Mississippi and the evidence shown by said opinion is broad enough without reference to the claimed federal question to sustain the state court judgment, *Murdock* v. *Memphis*, 20 Wall. 590, 636, and such finding of fact is independent of any claimed federal question. This Honorable Court generally will not reexamine the state court's findings and conclusions of fact. *Grayson* v. *Harris*, 267 U.S. 352, 358; *Portland R. Co.* v. *Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160.

THE QUESTION IS INSUBSTANTIAL

The Supreme Court of Mississippi has not evaded a federal question. The claimed federal question (p. 4 of Statement As to Jurisdiction) was not timely or properly raised, or passed on, but if it be construed otherwise, the question presented is not substantial. Save only as to this Honorable Court, the decision of the lower court is conclusively settled by the decision of the state court, and this Honorable Court may now

inquire whether the decision of the state court rests upon a fair or substantial basis and will examine the decision only to make certain that the nonfederal ground is not so colorable or insubstantial as to be in effect an evasion of the claimed constitutional issue. *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 654. It appears on the face of the opinion that the decision of the state court did not involve a federal question and it is, therefore, not reviewable. *McMillen* v. *Ferrum Min. Co.*, 197 U.S. 343, 347; *Pim* v. *St. Louis*, 165 U.S. 273, 274; *Steines* v. *Franklin*, 14 Wall. 20, 21.

The claimed federal question was not clearly necessary to a decision of this case. *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 555. A decision of a state court upon a question of law, as in this case, cannot be reviewed as presenting a question of the violation of the Fourteenth Amendment because such decision is asserted by appellant to be wrong, and contrary to previous decisions of the Supreme Court of Mississippi. *Patterson* v. *Colorado ex rel. Attorney General*, 205 U.S. 454, 460.

Without Section 5706 of the Mississippi Code of 1942, insurance companies could, at will, assert fraudulent defenses, and deny the "principal and agent" relationship, in all claims arising out of insurance policy contracts. Most assuredly, the statute is not designed for the protection of insurance companies, but is designed for the protection of the thousands of people insured, and, said statute, is not against public policy and justice. The fundamental liberties protected by the Fourteenth Amendment do not include immunity from restraint so deeply rooted in policy and justice, and liberty of contract, as applied to the claimed federal question in this case, is not an absolute concept. *Hart-*

ford Acci. & Indem. Co. v. *Nelson Mfg. Co.*, 166 Miss. 222, 147 So. 815, 291 U.S. 352, 358. When the policy of insurance was written by appellant, it was written subject to the applicable law of Mississippi, which was, or should have been, well known to appellant in the operation and conduct of its insurance business.

The case of *Mut. L. Ins. Co.* v. *Hilton-Green*, 241 U.S. 613, cited by appellant (p. 15, Statement As To Jurisdiction) is not applicable since the facts therein materially differ from this case, and the Florida statute, there construed, while similar, does not contain the provisions relative to "burdens imposed by law" as does Section 5706 of the Mississippi Code of 1942. The Supreme Court of Mississippi did not construe the Mississippi statute, *supra*, so as to increase the authority of appellant's insurance agent, but gave meaning and purpose to effectuate justice in relation to insurance policies and the common law rule of principal and agent.

Contractual rights are of public importance, but are of greater importance to policyholders. Therefore, we submit that, in this case, reasonable state regulation, public policy, and justice, outweighs the federal question presented, in favor of appellee and the thousands of present policyholders, and future policyholders. The nullification of the Mississippi statute, if applied in this case as being repugnant to the Fourteenth Amendment to the Constitution of the United States, will interfere with the rights of these thousands of policyholders, who will lose their rights under the present well-established state law. Therefore, for the foregoing reasons, appellee submits that the federal question is not substantial and merits no further consideration.

CONCLUSION

We most respectfully urge that, we believe if a review of this case is granted, the "gateway" will be open in Mississippi, as well as in other states, for losing litigants to claim grounds for review by simply raising in the state's highest court, for the first time, in a petition for rehearing, a federal question, whenever and wherever a state statute is casually mentioned in an opinion of the highest state court—without regard to state procedure, timeliness, or how frivolous the question may be.

Therefore, pursuant to Rule 16(1) (a) and (1) (b) of this Honorable Court, appellee moves that this appeal be dismissed, and a review be denied, on the grounds that: (1) there is a want of jurisdiction; (2) the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; (3) the judgments and opinions of the Supreme Court of Mississippi rested on adequate nonfederal basis and on adequate state grounds; and (4) the question is insubstantial.

Respectfully submitted,

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